IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 185 of 2001

with

Company Application No.273 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.S.DAVE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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M/S.BERGER PAINTS INDIA LTD.

Versus

M/S. NEWTON ENGINEERING & CONSTRTUCTION CO.LTD.

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Appearance :

Mr. Nilesh A. Pandya for the petitioner

Mrs. Swati Soparkar for the respondent

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CORAM : HONOURABLE MR.JUSTICE A.S.DAVE

Date : 11/08/2006

ORAL JUDGMENT

Petitioner-M/s. Berger Paints India Limited has filed this Company Petition for winding up claiming that M/s. Newton Engineering and Construction Company Limited has failed to pay outstanding dues of Rs.2,69,369/- of the petitioner-company. It is also claimed that the petitioner has entered into correspondence and, finally, statutory notice was given on 8th November 2000 by which demand was made to pay the outstanding dues of Rs.2,63,085/- with 18% interest. Acknowledgment of receipt of the above statutory notice is also produced on record as also the letter dated 19th June 2001 written by the respondent-Company by which it is stated that for reconciliation purpose, statement of accounts is to be furnished.

Upon issuance of notice by the Court on 1st October 2001, affidavit-in-reply was filed by the

Company Secretary of the respondent-company on 10th December 2001 by which it is stated that only Rs.558/- is to be paid to the petitioner as per the statement of accounts produced at Annexure "D" to the reply. It is also stated that the respondent-company is a going concern with its turn-over of Rs.52 crores and the net profit of Rs.1.5 crore for the year ended on 31st March 2001 and it is a dividend paying company, employing about 150 employees directly and providing alternative employment to more than 1000 workmen. It is further stated that by the order dated 5th September 2000 passed in Company Petition No.217 of 1997, [Annexure "A" to the affidavit-in-reply], M/s. Newton Engineering & Construction Company Limited was merged with the transferee company and named as M/s. Newton Engineering and Chemicals Limited.

Rejoinder and sur-rejoinder are filed substantiating the claim and opposing the same.

Mrs. Swati Soparkar, learned counsel for respondent- M/s. Newton Engineering & Construction Company Limited, has raised a preliminary objection contending, inter-alia, that, in view of the amalgamation of the transferee company with transferor company and on

creation of M/s. Newton Engineering and Chemicals Limited, completely a different juristic identity has come into existence under the provisions of the Companies Act, 1958 and the Rules made thereunder. She has further submitted that even though amendment substituting transferor-company is granted, the present proceedings cannot continue against the respondent-company and no winding up order can be passed. She has, further,submitted that the proper course or remedy available to the petitioner is to file Company Petition against M/s. Newton Engineering and Chemicals Limited in view of the amalgamation of M/s. Newton Engineering and Construction Company Limited as per the order dated 5th September 2000 passed in Company Petition No.217 of 1997. She has, further, submitted that the claim raised by the petitioner was against the erst-while Company known as M/s. Newton Engineering and Construction Company Limited and not against the Company in its present form, namely, M/s. Newton Engineering and Chemicals Limited. So far as M/s. Newton Engineering and Construction Company Limited is concerned, it has ceased to continue in its earlier form and, therefore, no final order of winding up can be passed. In support of her submission, she has relied upon the Oral

Judgment dated 13th April 2006 passed in Company Petition No.191 of 2000 with Company Application Nos. 423 of 2005 and 1 of 2006, wherein M/s. Newton Engineering and Construction Company Limited was the respondent-company, and submitted that the request made by the learned counsel appearing for the petitioner-company of allowing substitution was not accepted and Company Application No.455 of 2003 seeking impleadment of Newton Engineering & Chemicals Limited was declared as being infructuous. She has, further, submitted that the above judgment and order dated 13th April 2006 is latter in point of time than the order dated 8th March 2006 passed by the Court in the present proceeding, whereby, the amendment was granted. Even otherwise, she has submitted that the Company registered under the Act is different identity being juristic person and, even on merit also, the respondent-company is a running concern with a turn-over of sizable amount, as reflected from the affidavit-in-reply. She has, further, submitted that, even if some dues are admitted, the remedy lies elsewhere and not in the present proceeding.

In response to the preliminary objection, Mr. Nilesh A. Pandya, learned counsel for the petitioner has submitted that, by the order dated

10th February 2006, the transferee-company was allowed to be joined as party-respondent and, subsequently, the said amendment was granted by the learned Company Judge on 8th March 2006 and, therefore, the proceedings against the transferee-company by allowing it to be joined as party-respondent shall continue and, considering the fact that the dues demanded is still outstanding, the respondent-company is liable to be wound up.

At this stage, it is necessary to reproduce the orders passed by the Court earlier in the present proceeding.

On 10th February 2006, the Court passed the following order on the basis of the reply submitted by the respondent-company.

> “In view of the reply submitted by a company in which the respondent company is merged, the petitioner is asked to make an application for joining transferee company as party respondent. Let the application be filed within two weeks. Let the petitioner's representative along with the statement of accounts appear in the office of the transferee-company within fifteen days from today to reconcile the accounts of both the parties. If there is any reconciliation of the accounts, then the same may be submitted in the Court. Put up immediately thereafter.”

On 8th March 2006, the Court passed the following order:

> "Draft amendment is allowed. With joint requests of parties, S.O. to 21.3.2006."

On 8th April 2006, the Court passed the following order:

> "Mr. Pandya, learned counsel for the petitioner submits that both the parties have appointed some Chartered Accountant to look into the affairs and give its report so that disputes are settled. Put up in the last week of June 2006."

It is submitted at the Bar that, against the very respondent-company, other Company Petitions were filed and, on identical fact-situation, the Court passed Oral Judgment dated 13th April 2006 in Company Petition No.191 of 2000 with Company Application Nos. 423 of 2005 and 1 of 2006, wherein M/s. Newton Engineering and Construction Company Limited was the respondent-company, and it was observed by the learned Company Judge in paragraph 3 as under:

> "In the opinion of this Court, in light of the order dated 24.8.2005, no order of winding up against Newton Engineering and Construction Private Limited can be passed. By the said order dated 24.8.2005. Company Petition No.191 of 2000 has been made infructuous. In such company petition,

> neither a party can be substituted nor amendment can be allowed. As Company Petition No.191 of 2000 has become infructuous, no orders on Company Application No.423 of 2005 and Company Application No.1 of 2006 can be passed. These applications are rejected for the reasons aforesaid. Company Application No.191 of 2000 is also dismissed. However, the petitioner would be at liberty to file Company petition against M/s. Newton Engineering & Chemicals Limited in view of the merger of M/s. Newton Engineering and Construction Private Limited into the new company. He would also be entitled to take benefit of the time spent in this proceeding."

In the backdrop of the above and having heard the learned counsel for the parties, I find considerable force in the arguments canvassed by Mrs. Swati Soparkar, learned counsel for respondent- M/s. Newton Engineering and Construction Company Limited, that, even though amendment is granted, the proceeding of winding up cannot continue since status of the transferee-company is completely different and distinct than the Company against whom the winding up proceeding came to be initiated. After the order of merger, the Company named as M/s. Newton Engineering and Chemicals Limited is a different identity and has to function as per the provisions of the Act. The scheme annexed with the affidavit-in-reply, at Annexure "A", and the order passed on 5th September 2000 sanctioning the

amalgamation, provide the liabilities to accrue on transfer of the undertaking and change of new name, as provided in clause 5 of the scheme. The effect of the order dated 5th September 2000 was that M/s. Newton Engineering and Construction Company Limited did not exist and it stood merged with M/s. Newton Engineering & Chemicals Limited. Therefore, M/s. Newton Engineering and Construction Company Limited would no longer exist and its name has been struck off from the record of the Registrar of Companies without it being wound up. If any reconciliation of accounts can be done by exchanging statement of accounts or appointing any Chartered Accountant to resolve the issue, it is open for the parties to resort to such remedy. Hence, the preliminary objection raised by Mrs. Swati Soparkar, learned counsel for respondent- M/s. Newton Engineering and Construction Company Limited, is upheld.

At this stage, Mr. Nilesh A. Pandya, learned counsel for the petitioner has requested that the Court may not adjudicate the issues on merit and prayed for liberty to file appropriate proceeding in view of the merger of the respondent-company with the transferee-company.

The request of Mr. Nilesh A. Pandya, learned

counsel for the petitioner is accepted. This petition is disposed of with liberty to the petitioner to file appropriate proceeding in view of the merger of the respondent-company with the transferee-company. Notice is discharged with no order as to costs.

Consequently, Company Application No.273 of 2001 is also disposed of. Notice is discharged.

[Anant S. Dave, J.]

(swamy)